

Susan D. Pitchford, OSB No. 98081

sdp@chernofflaw.com

Brenna K. Legaard, OSB No. 00165

brenna@chernofflaw.com

CHERNOFF, VILHAUER, MCCLUNG & STENZEL, LLP

601 SW 2nd Avenue

1600 ODS Tower

Portland, Oregon 97204-3157

Phone: (503) 227-5631

Facsimile: (503) 228-4373

Attorney for Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ACUMED LLC, a Delaware limited liability
company,

Plaintiff

v.

SMITH & NEPHEW, INC., a Delaware
corporation,

Defendant.

No. CV04-1498-BR

**DEFENDANT'S MOTION
TO COMPEL COMPLIANCE
WITH SUBPOENA**

LR 7.1

Counsel for Defendant has conferred with counsel for Third-Party Stryker Corporation, but has been unable to resolve the issues herein. Counsel for Plaintiff Acumed LLC does not oppose this motion

LR 7.1(a)

Should Third-Party Stryker Corporation be compelled to produce, or to permit Plaintiff Acumed LLC to produce, a full copy of the summary judgment briefing and various depositions

taken in the lawsuit *Acumed LLC v. Stryker Corp. et al.*, No. CV 04-513-BR (D. Or. Filed April 14, 2004) (the “Stryker Lawsuit”)?

MOTION

Defendant Smith & Nephew, Inc., hereby brings this Motion to Compel with respect to a subpoena that it has served upon Stryker Corporation in this judicial district. A copy of said subpoena with proof of service is attached as Exhibit A to the memorandum in support of this motion filed simultaneously herewith.

Specifically, Smith & Nephew seeks access to all of the pleadings, briefs, and discovery from the Stryker Lawsuit, which involves Plaintiff Acumed’s assertions of infringement of the same patent at issue in this case, USPN 5,472,444, against Stryker Corporation and other related Defendants.

The instant dispute arises because Stryker has refused to produce (or to give its consent to Acumed to produce) the following information:

- The summary judgment briefing from the Stryker lawsuit;¹
- The deposition of Stryker witness Raymond Augustin and the exhibits thereto; and
- The depositions of Acumed’s testifying experts.

///

///

///

///

¹ Smith & Nephew was able to obtain a copy of Stryker’s Motion for Summary Judgment and related materials because these documents were not filed under seal, but it does not have a copy of Acumed’s Response to Stryker’s Motion or Stryker’s Reply Brief, or any supporting materials, because both of these filings were made under seal.

This motion is based on the provisions of FRCP 26, 37 and 45, and the memorandum submitted herewith.

DATED: May 23, 2005.

CHERNOFF, VILHAUER, McCLUNG &
STENZEL, LLP

/s/ Susan D. Pitchford

Susan D. Pitchford, OSB No. 98091
Brenna K. Legaard, OSB No. 00165
Telephone: (503) 227-5631
Attorneys for Defendant

Of Counsel:

William H. Boice
John S. Pratt
Steven D. Moore
Kilpatrick Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530
Telephone: (404) 815-6500
Fax: (404) 815-6555

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **DEFENDANT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA** has been served upon the following attorneys on May 23, 2005 as follows:

By Facsimile and First Class Mail

Peter J. Prommer
McAndrews, Held & Malloy, Ltd.
500 West Madison Street, Suite 3400
Chicago, IL 60661
Fax Number: (312) 775-8100

Attorney for Third-Party Stryker Corporation

Electronically through ECF System

Peter E. Heuser
James R. Abney
Kolisch Hartwell, P.C.
520 S.W. Yamhill Street, Suite 200
Portland, OR 97204-1378

Paul K. Vickrey
Robert A. Vitale, Jr.
Richard B. Megley, Jr.
Niro, Scavone, Haller & Niro
181 West Madison, Suite 4600
Chicago, IL 60602-4515

Attorneys for Plaintiff

DATED: May 23, 2005.

CHERNOFF, VILHAUER, McCLUNG
& STENZEL, LLP

/s/ Susan D. Pitchford
Susan D. Pitchford, OSB No. 98091
Brenna K. Legaard, OSB No. 00165
Attorneys for Defendant